MAR 27 2001

No. 00-767

(8)

Supreme Court, U.S.
FILED
MAR 27 2001
CLERK

In The

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ENRICO ST. CYR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF *AMICI CURIAE* OF THE FLORIDA IMMIGRANT ADVOCACY CENTER, CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, NATIONAL COUNCIL OF LA RAZA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, THE AMERICAN JEWISH COMMITTEE, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, IMMIGRANT AND REFUGEE SERVICES OF AMERICA, UNITE, HEBREW IMMIGRANT AID SOCIETY, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF TEXAS, COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, NORTHWEST IMMIGRANT RIGHTS PROJECT, COALITION FOR THE HUMAN RIGHTS OF IMMIGRANTS, WASHINGTON ALLIANCE FOR IMMIGRANT AND REFUGEE JUSTICE, AND THE MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are a broad range of legal assistance, community based, and national policy organizations concerned about the harsh impact of the 1996 amendments to the Immigration and Nationality Act[2] (INA) on longtime legal permanent residents and their families. Through their experiences as attorneys, family members, and friends of immigrants, *amici curiae* have gained extensive firsthand knowledge of the ways in which the elimination of discretionary relief from deportation for lawful permanent residents with pre-1996 convictions would affect our nation's families and communities. *Amici curiae* strongly believe that an understanding of these effects is essential to this Court's analysis of whether section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996[3] (AEDPA) and section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[4] (IIRIRA) eliminate INA § 212(c), 8 U.S.C. § 1182(c) (1994) relief for longtime permanent residents with convictions that pre-date AEDPA.

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[1] This brief *amici curiae* is filed with the written consent of all parties, which is on file with the Clerk of the Court. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission. *See* Supreme Court Rule 37.

[2] Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* (2001).

[3] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[4] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

The Florida Immigrant Advocacy Center (FIAC) is a nonprofit legal aid organization dedicated to promoting the basic human rights of immigrants. FIAC's attorneys have represented hundreds of lawful permanent residents affected by the 1996 amendments to the INA. In our experience, many permanent residents with pre-AEDPA convictions have extremely compelling cases and, if given the opportunity to file for 212(c) relief, would likely prevail in immigration court. FIAC submits this *amici curiae* brief to make the Court aware of the devastating impact the retroactive elimination of 212(c) relief would have on our nation's longtime immigrants, their American families, and our communities.

Citizens and Immigrants for Equal Justice (CIEJ) is a nationwide coalition of U.S. citizens and lawful permanent residents whose family members face deportation under the new immigration laws. As family members, CIEJ's members would be directly affected by the retroactive application of the 1996 amendments eliminating 212(c) relief. They are children who would lose their parents. They are men and women who would lose their husbands and wives and be left to raise children alone, without the support of their families' primary wage earners. And they are elderly parents who would be permanently deprived of the emotional and financial support of their sons and daughters. The retroactive elimination of 212(c) relief would make these hardships inevitable.

The American Immigration Lawyers Association (AILA) is a voluntary association of 7,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA's mission is to promote justice and advocate for fair and reasonable

immigration laws and policies. AILA members represent thousands of immigrants who have experienced a severe negative impact because of the retroactive elimination of discretionary relief from deportation.

The National Council of La Raza (NCLR) is a non-profit organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. The NCLR cooperates with other organizations on policy development, public education, and advocacy on immigration issues as well as other issues that affect Hispanic Americans. The NCLR it is deeply concerned that the retroactive elimination of 212(c) relief would threaten the well-being of many Hispanic American families.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights legal organization founded in 1968 to promote and protect the rights of Latinos in the United States through litigation, advocacy, and education. MALDEF has a long history of advancing the civil rights of immigrants. MALDEF is gravely concerned about the harsh effects of the 1996 amendments on immigrants and their families. The retroactive imposition of bars to 212(c) relief for pre-AEDPA criminal conduct is an issue of vital concern to MALDEF and the many immigrants it represents.

The Asian American Legal Defense and Education Fund (AALDEF) is a nonprofit civil rights organization that litigates issues affecting immigration, voting, and labor rights of Asian Americans. On a daily basis, lawful permanent residents, their families, their social workers,

and their attorneys contact AALDEF about hardships resulting from the 1996 amendments. The repeal of section 212(c) and its retroactive application to lawful permanent residents with pre-AEDPA convictions has left a wake of human tragedy affecting not only those individuals subject to deportation, but also their spouses, parents, and children.

Lutheran Immigration and Refugee Service (LIRS), founded in 1939, provides services and advocacy on behalf of refugees, asylum seekers and immigrants. LIRS provides direct services through its national resettlement affiliate network, gives grants to independent grassroots organizations providing legal services to immigrants, and coordinates Detention Watch Network, a coalition of organizations advocating for the reform of U.S. immigration detention policies. Through these activities, LIRS is concerned by the wrenching hardships facing lawful permanent residents and their families that would be brought about by the retroactive application of the 1996 amendments barring 212(c) relief.

The American Jewish Committee (AJC) is a national organization of approximately 100,000 members and supporters. AJC was founded in 1906 to protect the civil and religious rights of Jews and to promote human rights for all. Since its founding, AJC has been at the forefront of the movement to promote a generous and humane U.S. immigration policy. AJC is firmly opposed to the stripping away of due process and other civil rights of legal immigrants, which we believe is at odds with core American principles of justice and fairness. For this reason, AJC

is troubled by the prospect of 212(c) relief being eliminated for longtime permanent residents with pre-AEDPA criminal convictions.

The Leadership Conference on Civil Rights (LCCR) is a coalition of more than 180 national organizations committed to the protection of civil and human rights in the United States. The LCCR works in cooperation with other national, regional, and local organizations on policy analysis, public education, and advocacy activities relating to immigration and other important social issues affecting civil rights. The LCCR is deeply concerned that the retroactive elimination of 212(c) relief for lawful permanent residents threatens both American families and fundamental principles of civil rights.

The statements of interest from the remaining amici curiae are contained in Appendix A to this brief.

INTRODUCTION

The case of Enrico St. Cyr presents the question of whether Congress's 1996 amendments to INA § 212(c) eliminate the possibility of discretionary relief from deportation for longtime lawful permanent residents who face removal based on pre-AEDPA conduct. If the INS had initiated proceedings against these individuals before AEDPA, they would today be eligible to apply for relief under INA § 212(c) and thereby have the opportunity to present their equities to an immigration judge. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978) (equities include evidence of rehabilitation, nature of conviction, hardship, ties to the United States, and military and community

service). Yet the INS insists that the 1996 amendments strip these individuals of this right, even though the conduct that makes them deportable occurred prior to these amendments. This brief *amici curiae* uses case examples to illustrate how lawful permanent residents and their families will be affected by the outcome of Mr. St. Cyr's case and argues that the elimination of 212(c) relief for lawful permanent residents with pre-AEDPA convictions would be nothing short of a radical change in immigration law that would result in the mandatory deportation of many deserving lawful permanent residents.

STATEMENT OF FACTS

The following cases are some of the many examples of lawful permanent residents who, like Mr. St. Cyr, face imminent deportation if the INS is allowed to retroactively eliminate 212(c) relief. The INS considers all of these people aggravated felons. Thus, if the 1996 amendments eliminating INA § 212(c) are applied to their cases, they would be ineligible for any discretionary relief from deportation. Yet, in all of these cases, the individuals face deportation for conduct that predates the 1996 amendments. In many of the cases, the INS made no effort to deport the individuals at the time they became deportable. Had it done so, these lawful permanent residents would have been eligible to apply for the very 212(c) relief that the government now insists is unavailable to them.

Ihsan Elias Dawlett is a 58-year-old Iraqi who came to the United States in 1973 with his wife and family in order to obtain medical attention for his son, Firas, who has Down's Syndrome.[5] In 1979, the entire family became lawful permanent residents; his wife and three children later became U.S. citizens.[6] Mr. Dawlett built his own construction business and became a well-respected member of his church and community.[7] In 1996, Mr. Dawlett's wife of 27 years died, leaving him as the primary caretaker of their son Firas.[8] Although Firas is now 26, he still lives with his father and depends on him for emotional support and everyday needs.[9] Mr. Dawlett maintains an exceptionally close relationship with Firas and takes him to a school for people with special needs.[10]

In 1994, Mr. Dawlett was convicted of theft after he wrote a bad check for approximately $1,500 worth of construction supplies.[11] He pled guilty to the offense and received a five-year suspended jail sentence and probation.[12] In 1998, four years after his conviction, the INS

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[5] L-1 (Copy of Photograph of Firas Dawlett); L-2-3 (Letter of Counsel Peter Williamson).

[6] L-3.

[7] L-5 (Letter of Ali Hasoon); L-6 (Letter of Sam Delly); L-7 (Letter of Dr. Moayyad Ezzat).

[8] L-3-4 (Letter of Counsel Peter Williamson).

[9] L-8 (Letter of Director of Hope Village); L-3 (Letter of Counsel Peter Williamson); L-5 (Letter of Ali Hasoon); L-6 (Letter of Sam Delly); L-7 (Letter of Dr. Moayyad Ezzat).

[10] L-8 (Letter of Director of Hope Village).

[11] L-3-4 (Letter of Counsel Peter Williamson).

[12] L-3.

detained Mr. Dawlett and placed him in removal proceedings as an aggravated felon. Mr. Dawlett's detention had a devastating effect on his son Firas, who became withdrawn and cried constantly for his father.[13]

An immigration judge found that Mr. Dawlett was ineligible for 212(c) relief because the INS had not placed him in proceedings until after AEDPA. Had Mr. Dawlett been given the opportunity to file for 212(c) relief, he would likely have prevailed because of the strong equities in his case. Absent a finding from this Court that 212(c) relief remains available to people in Mr. Dawlett's circumstances, he will be ordered deported.[14]

Emma Mendez de Hay is a 40-year-old woman who came to the United States from Mexico more than 20 years ago and became a lawful permanent resident shortly thereafter. She is a divorced mother of four U.S. citizen children for whom she has been the primary care giver. Ms. Mendez de Hay's mother and all but one of her

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[13] L-8 (Letter of Director of Hope Village); L-9-11 (Letter of Dawlett and Bashar Dawlett).

[14] An immigration judge recently granted Mr. Dawlett deferral of removal under the Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985). However, a grant of deferral under the Convention Against Torture does not give Mr. Dawlett any lawful status or permanent permission to remain in the United States. *See* 8 C.F.R. § 208.17. If conditions change in Iraq, he will be deported unless he is given an opportunity to file for 212(c) relief. *See* 8 C.F.R. § 208.17(d)(4). *See infra* pages 24-25 and note 59.

siblings reside in the United States and are U.S. citizens or lawful permanent residents.[15]

In 1992, during a cousin's visit to her home, Ms. Mendez de Hay acted as a telephone interpreter for what turned out to be a drug transaction.[16] Ms. Mendez de Hay pled guilty to using a communication facility to facilitate the distribution of cocaine and cooperated with the government in its prosecution of the drug traffickers.[17] She was sentenced to three years' probation with no jail time. The government promised that it would recommend to the INS that she not be deported.[18]

Ms. Mendez de Hay completed her probation and resumed her life in Washington state. She built a successful restaurant business, paid taxes, continued to support her four children, and volunteered as an interpreter for a local hospital and clinic. With the goal of perfecting her English and becoming a professional interpreter, she obtained her GED and took college classes.[19] The INS

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[15] *Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail,* by Susan Gilmore, The Seattle Times, February 7, 2000; *Woman Awaits Deportation Appeal With Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped Up by Immigration Law,* by Tamyra Howser, The News Tribune, Jan. 1, 2001.

[16] *Woman Awaits Deportation Appeal With Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped Up by Immigration Law,* by Tamyra Howser, The News Tribune, Jan.1, 2001.

[17] L-12 (Letter from Counsel Erik Bauer).

[18] *Id.*

[19] *Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail,* by Susan Gilmore, The Seattle Times, Feb. 7, 2000;

made no effort to deport her for her conviction.[20] Had it done so, she would have been eligible to apply for relief from deportation under INA § 212(c). Moreover, she would have been a strong candidate for relief in light of her compelling equities, including her lack of any other criminal history.

In 1999, Ms. Mendez de Hay traveled to Italy to meet her fiancé's family. Upon her return, the INS detained her and placed her in removal proceedings. For seven months, she was detained at a facility in Louisiana, hundreds of miles from her children. During her detention, Ms. Mendez de Hay's 20-year-old daughter, an honor student at Pierce College, was forced to drop out of classes and work two jobs in order to support and care for her two younger brothers.[21] Ms. Mendez de Hay's 14-year-old son had problems at school, and her 11-year-old son, a child with special needs, became depressed and talked of wanting to die.[22]

Judge Orders Deportation of Puyallup Mother of Four, by Susan Gilmore, *The Seattle Times*, Feb. 10, 2000; *Woman Awaits Deportation Appeal With Fear, Hope: CATCH-22: Reunited With Her Kids, but in Limbo After Tripped Up by Immigration Law*, by Tamyra Howser, The News Tribune, Jan. 1, 2001.

[20] In 1995, Ms. Mendez de Hay presented herself for INS inspection upon her return from a trip abroad.

[21] L-13 (Letter of Vanessa Hay); L-14 (Letter of Professor Alan Kemp); *Caught in the Wheels of Justice*, by Nicole Brodeur, The Seattle Times, Mar. 14, 2000; *Puyallup Woman Comes Home: Emma de Hay Still Faces Fight With INS to Remain in U.S.*, by Tamyra Howser, The News Tribune, April 1, 2000.

[22] L-15 (Statement of Esmeralda Mendez); L-5-6 (Report from Sea Mar Community Health Center); *Caught in the Wheels of Justice*, by Nicole Brodeur, The Seattle Times, Mar. 14, 2000;

Ms. Mendez de Hay's case is currently pending at the Board of Immigration Appeals (BIA). Absent the opportunity to file for 212(c) relief, she will be ordered deported.

Carlos "Charlie" Jaramillo was born in Colombia and immigrated to the United States in 1965 at the age of eight months. His first language is English and he does not read or write Spanish. Mr. Jaramillo's wife, Laura, and two adolescent children, Jamie and Priscilla, are U.S. citizens. A construction contractor who ran his own business for many years, Mr. Jaramillo is considered a model citizen in his hometown of West Goshen, Pennsylvania.[23]

Over ten years ago, in 1989, Mr. Jaramillo pled guilty to possession with intent to deliver 1/3 of a gram of cocaine.[24] He received no jail time for this offense, but was instead sentenced to five years' probation and 200 hours of community service.[25] Mr. Jaramillo completed his probation and assumed that he could put the past behind him.[26] For seven years, the INS made no effort to deport him for his conviction. If the INS had placed Mr. Jaramillo in proceedings before AEDPA was enacted in 1996, he would have been eligible to apply for 212(c)

Tough INS Law Leaves Family in Turmoil as Trip to Italy Ends in Jail, by Susan Gilmore, The Seattle Times, Feb. 7, 2000.

[23] *Many Legal Immigrants Finding That Their Pasts can Catch up to Them With New Laws*, by Sudarsan Raghavan, The Philadelphia Inquirer, July 24, 1997.

[24] *Id.*

[25] *Id.*

[26] *Id.*

relief. Given his longstanding ties to the United States and his lack of other criminal history, he would likely have prevailed.[27]

In 1996, Mr. Jaramillo applied for citizenship. The INS arrested him at the naturalization office, detained him, and, seven years after his conviction, placed him in deportation proceedings as an aggravated felon.[28] Mr. Jaramillo was ordered deported and has a habeas corpus petition seeking 212(c) relief that is pending in district court. Absent a holding from this Court that 212(c) relief remains available for individuals in his circumstances, his deportation order will become final. Mr. Jaramillo's family members, including his U.S. citizen wife and two U.S. citizen children, are devastated by the prospect of Mr. Jaramillo being deported.[29]

Luis Perez is a decorated former Marine and Vietnam veteran who immigrated to the United States at the age of nine.[30] As an 11th grader in high school during the Vietnam War, Mr. Perez volunteered for the Marines.[31] He served in Vietnam for two years and was on active duty

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[27] *The Osgood File: Man Born in Colombia but Raised in the U.S. May be Deported Because of Single Arrest Several Years Ago* (CBS News Broadcast, July 8, 1997) (available on Burrelle's Information Services).

[28] *Id.*

[29] *Why is the Government Taking My Father Away?* by Jaime Jaramillo, Knight Ridder/Tribune News Service, June 23, 2000.

[30] Mr. Perez's full name is Luis Jose Bolivar Nicanor Perez-Portes.

[31] *Vietnam Vet Gets Break in Deportation Case*, by Mark Hamblett, New York Law Journal, Sept. 18, 2000.

status in the United States for an additional two years thereafter.[32] He received several medals for his service, reached the rank of corporal, and was honorably discharged.[33]

Mr. Perez is married and has four U.S. citizen children, including a daughter whom he supports while she is attending Pace University.[34] Mr. Perez had a heart attack in 1988 and he suffers from Conn's Syndrome, a disease of the adrenal gland that can be life threatening if untreated.[35] His health condition requires that he take medications regularly and remain under a doctor's care.[36]

In 1995, Mr. Perez was arrested for possession with intent to distribute cocaine. He pled guilty and received a two-year prison term to be followed by three years' supervision. A model inmate, Mr. Perez served only nine months and eleven days.[37] The INS made no effort to deport Mr. Perez at the time of his conviction. If it had, he would have been eligible to apply for 212(c) relief. In light of his military career, the fact that this was his only offense in an otherwise unblemished record, and the other equities in his case, Mr. Perez would likely have been granted 212(c) relief. In 1998, the INS initiated removal proceedings against him as an aggravated felon.

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[32] L-19 (Decision of the Immigration Judge).

[33] *Id.*

[34] L-20.

[35] *Id.*

[36] *Id.*

[37] *Id.*

The immigration judge ruled that Mr. Perez was ineligible for 212(c) relief because of the 1996 amendments.[38]

Vongphachanh "Rick" Siridavong, age 25, came to the United States as a refugee from Laos approximately 20 years ago. Both of his parents and all seven of his siblings are U.S. citizens. In 1995, shortly after graduating from high school, Mr. Siridavong went out with some high school friends and stole a car radio.[39] He pled guilty and received a two-year suspended jail sentence and probation, as well as restitution in the amount of $655.96 and 50 hours of community service.[40] Mr. Siridavong served no jail time for his offense. Due to excellent performance, he was released early from probation.[41] Shortly after his arrest, Mr. Siridavong began attending college.

In February 1999, shortly after Mr. Siridavong applied for citizenship, INS agents went to his house, handcuffed him in front of his mother, and placed him in removal proceedings.[42] He was detained for five months in a county jail. Because his crime is now considered an

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[38] The immigration judge terminated proceedings against Mr. Perez to allow him to apply for naturalization. The INS appealed that ruling to the BIA, however. If the BIA sustains INS's appeal, Mr. Perez faces deportation unless he is eligible for 212(c) relief.

[39] *INS Shifting Policy on Immigrant Detention*, by Philip P. Pan, The Washington Post, Aug. 9, 1999.

[40] L-26 (Letter from Probation and Parole Officer).

[41] *Id.*

[42] *INS Shifting Policy on Immigrant Detention*, by Philip P. Pan, The Washington Post, Aug. 9, 1999.

aggravated felony, Mr. Siridavong was found ineligible for 212(c) relief and ordered removed. Given the nature of his crime and his strong ties to the United States, Mr. Siridavong would likely have won his case if he had been allowed to apply for 212(c) relief. His case is pending on appeal at the BIA. Absent a holding by this Court that 212(c) remains available for cases such as his, his order of deportation will become final.

Jerry Arias-Agramonte is a 49-year-old lawful permanent resident who immigrated to the United States as a teenager in 1967. He is the father of six children, all of whom are U.S. citizens. *See Arias-Agramonte v. INS*, No. Civ 2412 (RWS), 2000 U.S. Dist. LEXIS 10724, at *6 (S.D.N.Y. July 31, 2000) (quoting decision of the immigration judge granting 212(c) relief). In 1977, Mr. Arias was in a New York restaurant when someone asked him to change a $50.00 bill. *Id.* at 5. The police then raided the restaurant and discovered that the $50.00 bill in Mr. Arias' possession was a marked bill from a drug transaction. *Id.* He pled guilty to criminal sale of a controlled substance in the fifth degree and was sentenced to two years' probation. *Id.* at 2. Mr. Arias received no jail time for this offense and has no other criminal convictions. *Id.* at 5-6.

For almost 20 years, the INS took no steps to deport Mr. Arias for his conviction. But in 1998, the INS detained Mr. Arias as he returned from his father's funeral in the Dominican Republic and placed him in removal proceedings. *Id.* at 2. An immigration judge granted Mr. Arias 212(c) relief based on his "unusual and outstanding" equities. *Id.* at 6. The INS appealed the decision, and the BIA reversed, holding that Mr. Arias was not eligible for

212(c) relief because INS had placed him in proceedings after AEDPA. *Id.* at 12. Mr. Arias filed a petition for writ of habeas corpus, which is being held in abeyance pending the outcome of Mr. St. Cyr's case.

Jose Velasquez is 53 years old and has been a lawful permanent resident for 41 years. *See Velasquez v. Reno*, 37 F.Supp. 2d 663, 664 (D.C. N.J. 1991). As a child Mr. Velasquez accompanied his father, a Panamanian diplomat, on assignments to the United States. *Id.* Mr. Velasquez remained in the United States to finish high school at West Catholic High School in Philadelphia. *Id.* He became a lawful permanent resident in 1960. In 1965, Mr. Velasquez married a U.S. citizen. They have three children, all of whom are U.S. citizens. His mother and all of his siblings are also U.S. citizens. For many years, Mr. Velasquez ran his own deli business in Philadelphia. *Id.*

In 1980, a friend approached Mr. Velasquez at a party and asked where he could buy some cocaine. Mr. Velasquez replied that he did not sell cocaine but suggested someone who might. *Id.* at 665. Mr. Velasquez was arrested and pled guilty to conspiracy to sell, and the sale or delivery of a controlled substance. He received no jail time but was sentenced to five years' probation and a $5,000 fine. *Id.* He finished his probation successfully and has had no criminal problems since.

The INS made no effort to deport Mr. Velasquez for his conviction prior to the 1996 amendments. If it had, he would have been eligible to apply for 212(c) relief. Mr. Velasquez would have been a strong candidate for such relief given the equities in his case. In 1998, the INS

detained Mr. Velasquez as he returned from a trip to Panama to visit his mother who was scheduled for surgery. The INS placed him in removal proceedings.[43] His removal order is currently on appeal to the BIA. Unless the Court finds that 212(c) relief remains available to individuals like Mr. Velasquez, his removal order will become final.

Javier Guevara is 31 years old and disabled. He came to the United States from Mexico at the age of four and became a permanent resident in 1988. Mr. Guevara is married to a Native American woman from the Pascua Yaqui Tribe and lives with her on the tribe's reservation. They have two U.S. citizen children, ages eight and five, who are also members of the Pascua Yaqui Tribe.[44] Mr. Guevara's mother and sister are also U.S. citizens. Mr. Guevara had to have his right leg amputated below the knee because of a bone infection. His amputated limb requires regular treatment from a physician and physical therapist.[45] Mr. Guevara also suffers from diabetes, which he controls with medication and regular monitoring of his blood sugar levels. Despite his disability, Mr. Guevara works for the Pascua Yaqui Tribe doing residential and commercial construction and is the sole supporter of his family.[46] Mr. Guevara also volunteers his time and skills

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[43] Both before and after AEDPA, Mr. Velasquez traveled abroad and each time had no trouble entering back into the United States.

[44] L-28-29 (Immigration Court Brief).

[45] L-29.

[46] L-36 (Letter from Bernie Montiel).

to renovate old buildings and homes on the reservation in Tuscon and Guadalupe, Arizona.[47]

In 1992, Mr. Guevara was convicted of conspiracy to sell cocaine for giving a friend a ride to a drug deal.[48] He received a sentence of four years' probation, 200 hours community service, and a $2,000 fine, which he successfully completed.[49] He served no jail time. The INS took no steps to deport Mr. Guevara for his conviction. Had the INS put Mr. Guevara in proceedings before 1996, he would have been eligible to apply for 212(c) relief. Moreover, he would have been a strong candidate for such relief given the compelling factors in his case.

In 2000, eight years after his drug conviction, the INS initiated proceedings against Mr. Guevara as an aggravated felon. He has asked for the opportunity to file for 212(c) relief, but the INS argues that he is ineligible because it did not start proceedings against him until after AEDPA. His case is pending in immigration court.

The Tribal Counsel of the Pascua Yaqui Tribe considers Mr. Guevara a respected and valuable member of the tribal community and recently passed a resolution urging the INS not to deport him.[50]

Carlos Garcia left his home country of El Salvador in 1978 during the civil war, and he became a permanent resident in 1982. Both of Mr. Garcia's parents are U.S.

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[47] L-38 (Resolution of Pascua Yaqui Tribe).

[48] L-29 (Immigration Court Brief).

[49] L-29.

[50] L-37-40 (Resolution of the Pascua Yaqui Tribe).

citizens. Upon arriving in the United States, Mr. Garcia attended the International Language Institute in Washington, DC and learned to speak, read, and write English fluently. He also attended the Northern Virginia Community College and took courses in engineering.[51] For years, Mr. Garcia has worked for a catering company. As part of his job, he has worked at functions at the White House, including the inauguration of President Ronald Reagan and a dinner hosted by President George Bush, Sr.[52] Mr. Garcia regularly attends church, is a member of the Smithsonian Institute, and is involved with a bone marrow transplant program to help children.[53]

In 1993, Mr. Garcia pled guilty to taking $200 from the department store where he then worked.[54] He was sentenced to two years' probation with a suspended two-year jail sentence. He completed probation early and served no jail time.[55] Apart from this single incident, Mr. Garcia has no criminal history and would have been a strong candidate for 212(c) relief.[56] The INS, however, took no steps to deport him for this conviction before 1996.

In 1998, the INS placed Mr. Garcia in removal proceedings after he returned from a brief trip abroad. Because his crime is now considered an aggravated

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[51] L-41 (Letter of Carlos Garcia).

[52] L-41-42.

[53] L-42-43.

[54] L-45 (Immigration Court Motion).

[55] *Id.*

[56] L-46.

felony, the INS argues that he is ineligible for 212(c) relief. Absent the opportunity to file for such relief, he faces mandatory deportation.

SUMMARY OF THE ARGUMENT

Lawful permanent residents with pre-AEDPA convictions are valuable members of society with compelling equities against deportation. If given the opportunity to apply for 212(c) relief, many of them would likely prevail. They have served honorably in our nation's wars. They marry U.S. citizens, raise U.S. citizen children, and care for U.S. citizen parents. They run businesses and volunteer in our communities. In many cases, their last contact with the criminal justice system was years, even decades, ago. Their convictions often involved minor offenses, even misdemeanors, for which they served little or no jail time. In some cases, they were not even subject to deportation at the time they were convicted. In others, they faced possible deportation, but would have been able to apply for 212(c) relief before immigration judges who would have heard their cases.

These individuals and their families now face their worst nightmare. After living, working, and traveling as lawful permanent residents for years, many now face mandatory deportation for their old convictions unless they are given the opportunity to apply for 212(c) relief. Others could be detained indefinitely if the INS is unable to deport them to their home countries. Many immigrated to the United States as young children and do not even

speak, read, and write the language of the country in which they were born.

For many permanent residents, the timing of when the INS initiated proceedings precluded them from 212(c) relief. Because many of these individuals were deportable at the time of their conviction, the INS could have started immigration proceedings prior to AEDPA's passage in 1996. If it had done so, these individuals would today be unquestionably eligible for 212(c) relief.

ARGUMENT

I. THE RETROACTIVE ELIMINATION OF INA § 212(c) WOULD BE A RADICAL CHANGE IN IMMIGRATION LAW AFFECTING A WIDE RANGE OF DESERVING LAWFUL PERMANENT RESIDENTS, INCLUDING VETERANS, SPOUSES AND PARENTS OF U.S. CITIZENS, BUSINESS OWNERS, AND COMMUNITY LEADERS.

A. The Retroactive Elimination of 212(c) Would Require the Deportation of Valuable Members of Society.

Many lawful permanent residents with pre-AEDPA convictions are productive members of society who merit the opportunity to apply for 212(c) relief. Some, like Javier Guevara, have spent countless hours helping others and improving their communities. Despite being disabled, Mr. Guevara has dedicated numerous hours to volunteering on the Pascua Yaqui Reservation, donating his time and skills renovating old buildings. The tribe considers him such an asset to his community that the

Tribal Council passed a five-page resolution urging the government not to deport him.

Individuals with pre-AEDPA convictions are also business owners. They work, pay taxes, and support their families. Emma Mendez de Hay started a successful restaurant business and is the primary supporter of her children. Both Charlie Jaramillo and Ihsan Dawlett had their own construction businesses for years, and Jose Velasquez owned a Philadelphia deli.

Finally, individuals with pre-AEDPA convictions are veterans who have risked their lives in service of our nation. Luis Perez, for example, was a Marine corporal in the Vietnam War.

A wide range of deserving permanent residents stand to be affected by the retroactive elimination of 212(c) relief. Our nation's communities will lose valuable members if individuals with pre-AEDPA convictions are not given an opportunity to apply for such relief.

B. Elimination of 212(c) Relief for Permanent Residents with Pre-AEDPA Convictions Would Convert the Mere Possibility of Deportation Into Mandatory Deportation, Even for Individuals with Minor Crimes.

For many individuals like Mr. St. Cyr, the effect of being barred completely from 212(c) relief means *mandatory*, not possible, deportation. Those individuals whom the INS cannot deport to their home countries could be

held in indefinite detention.[57] The radical nature of the retroactive elimination of 212(c) relief cannot be overstated. Relief under INA § 212(c) is the only permanent relief available to permanent residents with aggravated felony convictions.[58] Because the aggravated felony definition now includes minor crimes and crimes with probation or suspended sentences, many permanent residents have been transformed into "aggravated felons."

In AEDPA and again in IIRIRA, Congress greatly expanded the type of crimes that qualify as aggravated felonies. Under the current definition, crimes that are neither aggravated nor felonies under criminal law nevertheless qualify as "aggravated felonies" under immigration law. For example, theft offenses with one-year suspended sentences are aggravated felonies. *See* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2001) (theft offenses with a one-year term of imprisonment are aggravated felonies); INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2001) ("term of imprisonment" includes suspended sentences).

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[57] The INS is detaining approximately 5,000 people, including former permanent residents, who cannot be deported because their countries will not accept them. *See Catholic Legal Immigration Network, Inc., The Needless Detention of Immigrants in the United States*, Report 4, Aug. 2000, at 45 (visited March 25, 2001) <http://www.cliniclegal.org/atriskrpt.htm> (username: clinicsf, password: 94104). The Court is currently reviewing the legality of this detention. *See Ashcroft v. Ma*, No. 00-38 (oral argument held Feb. 21, 2001).

[58] Congress in IIRIRA renamed 212(c) relief as "cancellation of removal" but barred all aggravated felons from this relief. *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2001).

Misdemeanors can be aggravated felonies. *See Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001) (attempted stealing of tire rims with a suspended sentence over a year is an aggravated felony); *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (misdemeanor theft of $10 video game with one-year suspended sentence is an aggravated felony). Low level assault and battery offenses can also be aggravated felonies. *See* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2001); *see also U.S. v. Holguin-Enriquez*, 120 F.Supp. 2d 969 (D.Kan. 2000) (assault in violation of municipal ordinance with one year suspended sentence is an aggravated felony).

The retroactive elimination of 212(c) would have some of its harshest effects on individuals prosecuted for relatively minor crimes that carried minimal sentences. People like Rick Siridavong and Carlos Garcia pled guilty to minor theft offenses and assumed that they would be able to go on with their lives. Mr. Siridavong received a two-year suspended sentence and community service for taking a car radio with some friends. He never spent any time in jail until INS arrested him at his home after he applied for citizenship. At the time that he was convicted, Mr. Siridavong was not even subject to deportation. Now he is an "aggravated felon" and, according to the INS, ineligible for any relief from deportation.

Mr. Garcia finds himself in a similar situation. He received a two-year suspended sentence for taking $200 dollars from the department store where he worked. Like Mr. Siridavong, Mr. Garcia never spent any time in jail and was not deportable at the time of his crime. Now he is an "aggravated felon" who faces deportation unless he is given the opportunity to file for 212(c) relief.

The only permanent relief available to lawful permanent residents like Mr. Siridavong and Mr. Garcia is INA § 212(c). While individuals who fear return to their home countries may be eligible for other relief, this relief is temporary and falls far short of permanent residency. Moreover, no other type of relief available to aggravated felons allows the applicant to present evidence of rehabilitation and family hardship.[59]

C. The Retroactive Elimination of 212(c) Relief Will Result in Extreme Hardship to Spouses, Children, and Parents Who are U.S. Citizens.

Deserving lawful permanent residents with pre-AEDPA convictions are not the only people who would suffer from the elimination of 212(c) relief. The family members of these permanent residents, many of whom are U.S. citizens, would also experience devastating hardship.[60]

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[59] Some permanent residents with aggravated felony convictions may qualify for relief under withholding of removal, INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2001), and Article 3 of the Convention Against Torture, but relief under these provisions is temporary and very different from permanent residency. Unlike permanent residents, individuals granted withholding can be deported if conditions in their home countries change. *See* 8 C.F.R. § 208.23(b). The differences between permanent residency and relief under Article 3 of the Convention Against Torture are even more marked. Deferral under Article 3 is only temporary, confers no lawful immigration status whatsoever, and individuals granted deferral are not necessarily released from detention. *See* 8 C.F.R. § 208.17.

[60] *See* Symposium, *United States Immigration Policy at the Millennum: Understanding the Impact of the 1996 Deportation Laws*

The threat of losing a family member to deportation has already had a severe negative impact on the families of the individuals discussed in this brief. The children of Emma Mendez de Hay, all of whom are U.S. citizens, have been particularly hard hit by the possibility that their mother will be deported. Ms. Mendez de Hay's 20-year-old daughter was an honors student at Pierce College before her mother was detained. While her mother was in detention, she had to drop out of school to work two jobs in order to support her younger brothers. Ms. Mendez de Hay's 11-year-old son, a child with special needs, battled depression and repeatedly talked about wanting to die. Ms. Mendez de Hay's 14-year-old has had problems in school.

The case of Ihsan Elias Dawlett provides another example. Ever since Mr. Dawlett lost his wife of 27 years in 1996, he has taken care of his son Firas, a U.S. citizen born with Down's Syndrome. Mr. Dawlett and his son are exceptionally close. Although Firas is now 26, he still lives with and depends on his father. Mr. Dawlett attends to Firas's everyday needs and takes him to a school for people with special needs. While Mr. Dawlett was in INS detention, Firas became withdrawn and cried constantly for his father. Because Firas is so dependent on Mr. Dawlett, the impact of losing his father to deportation would be particularly severe. Unless 212(c) relief is made available to Mr. Dawlett, Firas stands to lose his caretaker.

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and the Limited Scope of Proposed Reforms, 113 Harv. L. Rev. 1950 (2000) (discussing family hardships caused by deportation).

II. MANY PERMANENT RESIDENTS WITH PRE-AEDPA CONVICTIONS WOULD TODAY BE UNQUESTIONABLY ELIGIBLE FOR 212(c) RELIEF IF THE INS HAD STARTED PROCEEDINGS BEFORE AEDPA.

Many of the lawful permanent residents who will be affected by the outcome of Mr. St. Cyr's case have old criminal convictions. For years, they have lived, worked, traveled, and raised families without any threat of deportation. Although for years the INS did not seek to deport these individuals, it has now placed them in immigration proceedings. If these individuals had been in proceedings before AEDPA, they would have been given the opportunity to apply for 212(c) relief. Now these permanent residents face mandatory deportation based solely on when INS initiated proceedings against them.

In many cases, extraordinary lengths of time passed between the individual's conviction and the INS's commencement of proceedings. In Jose Velasquez's case, 18 years passed between his 1980 conviction and the date the INS placed him in proceedings. Because Mr. Velasquez has a drug conviction, the INS could have sought his deportation at the time he was convicted. Moreover, the INS had numerous contacts with Mr. Velasquez when he sought reentry after multiple trips abroad. Although the INS could have sought Mr. Velasquez's deportation at the time that 212(c) was still part of the INA, it did not and instead waited until 1998. Mr. Velasquez now faces mandatory deportation unless he is given the opportunity to file for 212(c) relief.

The INS waited even longer in the case of Jerry Arias-Agramonte. Mr. Arias was deportable for his drug offense in 1977 but the INS did not place him in proceedings for over 20 years.

Many of the individuals whose lives hinge on the outcome of Mr. St. Cyr's case made mistakes in the past but are now well-respected and valuable members of society. Their deportation would have a devastating effect on American families and communities. Longtime permanent residents with pre-AEDPA convictions should not be deprived of the right to file for 212(c) relief solely because the INS started proceedings against them after AEDPA was enacted.

CONCLUSION

Amici curiae urge the Court to affirm the decision of the Court of Appeals of the Second Circuit.

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APPENDIX A

Immigration and Refugee Services of America (IRSA)

IRSA is a national, nonprofit, nonsectarian agency with an 84-year history of service to refugees, asylum seekers, and other newcomers to the United States. IRSA is one of the contracting partners of the State Department's Bureau of Population, Refugees, and Migration. Through a network of 34 partner agencies nationwide, IRSA provides resettlement, legal representation, and other services to asylum seekers and immigrants. Because IRSA and its partner agencies work in a variety of capacities with immigrants and their families, IRSA has witnessed the devastating impact of the retroactive elimination of 212(c) relief on permanent residents and their families.

Union of Needletrades, Industrial & Textile Employees, AFL-CIO (UNITE)

UNITE represents apparel and textile workers in the United States, Puerto Rico, and Canada. Many of its members were born outside the United States. UNITE, through its Immigration Project, provides immigration legal services to members and their families. Many UNITE members have close relatives who would experience the harsh consequences of the retroactive elimination of INA § 212(c).

The Hebrew Immigrant Aid Society (HIAS)

HIAS is America's oldest international migration and refugee resettlement agency. HIAS is dedicated to assisting persecuted people worldwide and delivering them to

countries of safe haven. In its 120 years of existence, HIAS has rescued more than 4.5 million people. HIAS oversees the resettlement of refugees in the United States through a network of Jewish communal agencies. HIAS also provides direct immigration legal services in the New York metropolitan area to detained asylum seekers and immigrants. HIAS is concerned that the retroactive application of the 1996 amendments would result in the forced separation of families.

Lawyers' Committee for Civil Rights Under Law of Texas (Texas Lawyers' Committee)

Texas Lawyers' Committee is a nonpartisan, nonprofit law firm founded in 1991 and committed to attaining and preserving civil rights for immigrants and refugees throughout Texas. The Texas Lawyers' Committee has represented numerous individuals with pre-AEDPA convictions who now face mandatory deportation because of the INS's retroactive application of the 1996 amendments to their cases.

Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)

CHIRLA is a nonprofit organization founded in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles. CHIRLA aims to foster greater understanding of issues affecting immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to more effectively advocate for positive change. Through this work, CHIRLA has observed the tremendous negative impact that the INS's retroactive

elimination of 212(c) relief has had on permanent residents and their families.

Florence Immigrant and Refugee Rights Project (Florence Project)

The Florence Project is a nonprofit organization that provides free legal assistance to INS detainees in Arizona. Since the 1996 amendments, we have seen the detainee population increase tremendously. Many of the individuals the Florence Project counsels are longtime lawful permanent residents with pre-AEDPA convictions who would have been eligible to apply for 212(c) relief prior to the 1996 amendments. Because of the INS's retroactive application of these amendments, these individuals now face mandatory deportation.

Northwest Immigrant Rights Project (NWIRP)

NWIRP is a nonprofit organization committed to defending and advancing the rights and dignity of low-income immigrants and refugees in Washington state through community education, advocacy, and immigration legal services. Many of those NWIRP serves have been directly affected by the INS's retroactive application of the 1996 amendments eliminating 212(c) relief. In NWIRP's experience, the INS's threat of mandatory deportation has caused extreme distress to permanent residents and their families.

Coalition for the Human Rights of Immigrants (CHRI)

CHRI is an organization of immigrants and advocates formed in October 1997 to confront anti-immigrant policies through grassroots education and action in the New York City area. Through CHRI's community interactions, CHRI has witnessed the harsh effects of the retroactive bars to 212(c) relief created by the 1996 immigration laws.

Washington Alliance for Immigrant and Refugee Justice (WAIRJ)

WAIRJ is a statewide alliance of organizations and individuals and a leading source of organizing and advocacy on immigration issues in Washington state. WAIRJ has direct contact with permanent residents and their families who are affected by the 1996 amendments. In WAIRJ's experience, INS's retroactive elimination of 212(c) has had a devastating effect on lawful permanent residents and their families.

Heartland Alliance/Midwest Immigrant and Human Rights Center (MIHRC) (formerly known as Travelers & Immigrants Aid)

MIHRC is a nonprofit organization providing legal services to low-income immigrants in the Greater Chicago area. MIHRC regularly conducts presentations to community organizations and the private and criminal bar concerning the immigration consequences of crimes and the

eligibility requirements for 212(c) relief. MIHRC represents individuals who are applicants for 212(c) relief or who would be eligible for such relief but for the INS's retroactive application of the 1996 amendments to their cases.

APPENDIX B

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